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AUTHOR	Kaufman, Hattie E.
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ABSTRACT

This brochure addresses federal laws, regulations, and litigation that dictate how colleges and universities must accommodate the needs of students with disabilities. Emphasis is on the Americans with Disabilities Act and the Rehabilitation Act of 1973, Section 504. A summary of the laws' definitions of "handicap" or "disability" reviews litigation concerning the importance of the perception of handicap or disability and special problems with the conditions of drug and alcohol addiction. Requirements for federally assisted programs and activities are noted. Consideration is then given to specific student issues including admissions, adjustments to the academic program, auxiliary aids, student housing, financial aid, student employment, career counseling, placement, physical education and athletics, and health care and health insurance. Other aspects summarized include requirements for physical accessibility and transportation systems. Attached are a checklist of university offices and departments affected by the legislation and an appendix giving specific regulations on postsecondary education. (DB)

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Access to Institutions of Higher Education for Students with Disabilities

HATTIE E. K

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Hattie E. Kaufman is an attorney in the Office of Counsel of the University of Alabama System. She received her J.D. from Syracuse University College of Law.

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Access to Institutions of Higher Education for Students with Disabilities

Introduction

In recent years, the fixed image of a "typical" college or university student has just about dissolved, reflecting the broad diversity of individuals now pursuing higher education. As a prime example of this, the movement of individuals with disabilities into the mainstream has been clearly mirrored in the increasing numbers of students with disabilities enrolling in colleges and universities. Heightened sensitivity to the barriers these individuals encounter in their daily lives has spawned a large body of federal law designed to assist them in becoming fully integrated into society at large. Several of these laws, and the regulations that go along with them, have direct application to the way colleges and universities operate and the way in which they relate to their student populations.

This pamphlet will address the federal laws and regulations that dictate how colleges and universities must accommodate the needs of students with disabilities. Many of these same rules also affect the way institutions must deal with their employees, as well as the general public, but such considerations are outside the scope of this publication.

Relevant Legislation and Regulations

The Americans with Disabilities Act[1] ("ADA"), which became law in July of 1990, has been heralded as "the most comprehensive piece of disability civil rights legislation ever enacted and the most important piece of Civil Rights Legislation since the 1964 Civil Rights Act...."[2] Its recent enactment, however, should not obscure the significant legal developments that occurred in this field during the 1970's and 1980's.

1. Public Law 101-336, 42 U.S.C. § 12101 *et seq.*

2. Mayerson, *The ADA - An Historic Overview*, 7 LABOR LAWYER 1 (1991).

Passage of the Rehabilitation Act of 1973 signified a recognition by Congress of the need to protect disabled persons from unfair treatment in government-funded operations. Section 504 of the Rehabilitation Act[3] (commonly referred to simply as "Section 504"), as amended by the Civil Rights Restoration Act, prohibits all programs or activities receiving federal financial assistance from excluding or discriminating against disabled individuals who are otherwise qualified to participate in those programs or activities.

Unlike the laws prohibiting discrimination against minorities and women, Section 504 entails a more complex conceptual construction. Because there are certain inherent differences between disabled and nondisabled individuals, a simple rule that the two groups be treated exactly the same would often be detrimental to the disabled by perpetuating the effects of those inequalities. Instead, a structure was developed under which the irrelevant differences could be accommodated, so that disabled persons could be afforded equal access to all federally-assisted programs and, ultimately, could participate equally with those who are not disabled.

Other federal laws were enacted to require adaptations in the design and construction of public buildings to accommodate physically disabled individuals,[4] as well as the removal of architectural barriers from structures built or renovated with federal money.[5]

The ADA significantly expanded upon the coverage of all these laws by providing a comprehensive plan for eliminating discrimination against disabled individuals, not only in the public sector, but in the private sector as well. However, because the ADA is in large measure modeled on the legal definitions and interpretations developed under Section 504 and because most colleges and universities have been required to comply with Section 504 since 1973, the ADA will probably have less impact on higher education than on other

3. 29 U.S.C. § 794.

4. 42 U.S.C. § 4151 *et seq.*

5. 29 U.S.C. § 794b.

segments of American life. Accordingly, this pamphlet will emphasize the statutory and regulatory scheme of Section 504, as interpreted in court decisions, but will highlight areas where the ADA and the regulations proposed for implementing it[6] may have some significant influence.[7]

Definition of a "Handicap" or "Disability"[8]

Before a college or university can begin determining what it is required to do in order to provide access to persons protected by this array of laws, it is necessary to clarify just who are these protected persons.

The laws generally protect any person who has "a physical or mental impairment which substantially limits one or more of such person's major life activities," as well as a person who has a history of, or is regarded as having, such an impairment.[9] The regulations drawn up under the authority of these statutes have tried to clarify this general language,[10] but some of these regulatory attempts to define the

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6. The Department of Justice issued Notice of Proposed Rulemaking, proposing regulations for codification at 28 C.F.R. Part 36, to implement the ADA. 56 Fed. Reg. 7452 (February 22, 1991). The deadline for comments was set as April 23, 1991, and final regulations will be issued sometime after that. These proposed regulations are cited in this pamphlet as "DOJ Regulations."

7. Another statute, the Education for All Handicapped Children Act, directly mandates the provision of educational access to disabled students; however, since the courts have indicated that the Act would not be applicable to college education unless there were a law in a specific state guaranteeing all state residents an education past the high school level, this particular Act is not germane to this discussion.

8. A note about terminology: Section 504 used the terms "individual with handicaps" and "qualified handicapped person." The ADA, however, recognized the current preference for the term "disability" rather than "handicapped." In line with this, "disability" and its derivatives will be used in this pamphlet, except when making direct reference to Section 504.

9. 29 U.S.C. § 706(8)(B); 42 U.S.C. § 12102(2).

10. The term "life activities" encompasses "communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing, etc." 41 C.F.R. Part 60-741 App. A. The laundry list of "physical or mental impairments" enumerates "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 34 C.F.R. § 104.3(j)(2)(i). These definitions are mirrored in the DOJ Regulations.

protected class of persons have ultimately led to lawsuits. The courts' decisions in those suits, however, have at least provided some guidance in determining where to draw the line.[11]

The Importance of the Perception of Handicap or Disability

In one such case, *School Board of Nassau County v. Arline*,[12] the Supreme Court was faced with the issue of whether a teacher who had been hospitalized for treatment of tuberculosis was a "handicapped individual" and therefore protected by Section 504 from being fired because of her physical condition. As a first step, the Court found that the teacher's affliction was severe enough to have interfered with one or more of her major life activities.

The Court then proceeded to discuss why the *contagious* effects of her disease could not be "meaningfully distinguished" from tuberculosis' *physical* effects. The school board had claimed that it had fired her, not because of any physical disability resulting from her disease, but because her condition was contagious. It furthermore contended that this latter reason for termination was not prohibited by law.

However, because the purpose of Section 504 is to protect persons with disabilities from the fears and prejudice of others, the Court stated that an individual's contagiousness, in and of itself, could not lawfully serve as a basis for termination of employment. Only if the infectious nature of one's disease specifically disqualified an individual from participation in a particular activity could that aspect of the disease permissibly form the basis for exclusion from the activity. Thus, in *Arline*, this teacher's condition could provide a lawful reason for termination only if contagious tuberculosis were found to make her unqualified to teach in a public school system. As the Supreme Court noted, however, a person with a contagious disease would not be "otherwise

11. In a recent case, "life activities" were held specifically to include "learning." *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1381 (3rd Cir. 1991).

12. 480 U.S. 273 (1987).

qualified" to teach if this would create a significant health risk that could not be corrected through a "reasonable accommodation."

This balancing of the right of the disabled person against the risks that he or she would create has been carried over into the ADA. Although it is clear from the legislative history of the ADA that persons who, for example, are HIV-positive should be considered disabled even if not presently suffering from the symptoms of AIDS, they are not "qualified" to work in a job (possibly surgery or dentistry) where they would pose a "direct threat to the health or safety" of others in the workplace.[13]

The *Arline* case, with its extensive discussion of the effect of contagious disease is, of course, especially significant in light of the increasing numbers of individuals with AIDS whom college and university administrators will invariably encounter in the coming years.[14]

Beyond the issue of contagion, however, the decision in *Arline* is also important because it stresses the Court's view that the protection of the laws against discrimination is to be extended to cover fully those persons whose disabling conditions loom larger in the minds of others than they do in their everyday effect. Both those who actually experience substantial limitations in their major life activities and those whom others perceive as experiencing such limitations are shielded by the law. Not only is it necessary to provide evenhanded treatment to the person whose life activities are affected by a mental or physical impairment, so too is it necessary to treat fairly the person whose medical history would lead others to conclude (rightly or mistakenly) that he or she is in some way limited. The *Arline* court's interpretation of perceived handicaps is reflected in the DOJ Regulations' statement that one is deemed to have an impairment even if the limitations are incurred "only as a result of the attitudes of others toward such impairment."[15]

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13. 42 U.S.C. §§ 12111(3), 12113(b).

14. The DOJ Regulations have specifically included HIV disease and tuberculosis under the definition of "physical or mental impairment."

15. 28 C.F.R. § 36.104 (proposed).

8.

Drug and Alcohol Addiction

Two specific disabling conditions—alcoholism and drug addiction—require special discussion because of the strong public policy sentiments that each evokes.

When the Department of Health, Education and Welfare, now reconstituted as the Department of Education, first published its regulations for implementation of Section 504, it received numerous questions concerning applicability of both the statute and the regulations to individuals whose disability stemmed from alcohol or drug abuse. In response to these queries, the Department sought a legal opinion from the Attorney General to clarify whether Section 504's definition of a disability included these conditions. The Attorney General's legal opinion stated that alcoholism or drug addiction, if it results in limitations of an individual's life activities, is to be treated as a disability, thereby entitling afflicted individuals to all the protections of Section 504.

Inclusion of alcoholism and drug addiction within the law raises special concerns because of the behavioral problems that may be manifested by persons suffering from them. In view of these concerns, the Department of Education's analysis of its regulations implementing Section 504 takes pains to point out that, as with other disabled persons, only those persons who are addicted to drugs or alcohol but who are nevertheless "otherwise qualified," must be given access to programs covered by the law and the regulations. Thus, if the drug addict or alcoholic cannot meet the same standards of behavior and performance that are demanded of nonalcoholics and of those who are not addicted to drugs, the university is perfectly justified in denying him or her access to its programs.

Moreover, as long as the same rules are applied to the entire student population, the university may enforce campus prohibitions against possession or use of illegal drugs or alcohol. This is especially significant in view of current legislation requiring colleges to certify that they operate a drug-free

workplace[16] and a drug-free campus,[17] as well as the general raising of the legal drinking age to 21 (which effectively makes it illegal for many college-age students to consume alcoholic beverages).

The relevance of the original Attorney General's legal opinion has been significantly narrowed, moreover, by a provision in the ADA that specifically excludes from its definition of "individual with a disability"[18] those persons who are currently engaging in the illegal use of drugs. It also amends the Rehabilitation Act to express the same exclusion.[19] However, the ADA makes clear that a university cannot discriminate against a person with a record of drug abuse who is not currently engaged in the illegal use of drugs and who has successfully completed a supervised drug rehabilitation program, is otherwise successfully rehabilitated, is currently participating in a supervised drug rehabilitation program, or is only erroneously regarded as currently engaging in the illegal use of drugs. Further, a university cannot deny health services or any other services provided in connection with drug rehabilitation to a person using drugs if the person is otherwise entitled to such services.[20]

Federally-Assisted Programs and Activities

Since the focus of this pamphlet is on the application of both Section 504 and ADA, it is important to understand which colleges and universities are subject to which statutes. The presence of federally-assisted programs and activities triggers the requisites of Section 504.

The vast majority of universities and colleges in the United States receive some form of federal financial assistance in support of some phase of their programs. This most typically comes in the form of research grants, service contracts, student financial assistance, or allocations to land grant colleges. Prior to the

16. 41 U.S.C. § 701 *et seq.*
17. 20 U.S.C. § 1145g.
18. 42 U.S.C. § 12210.
19. 29 U.S.C. § 706(8).
20. 42 U.S.C. § 12112(b).

amendment of Section 504 in 1988, it was possible at least to argue that only those narrowly drawn programs actually receiving direct federal funding should be subject to the strictures of this law.[21] In the amendments added by the Civil Rights Restoration Act, however, the definition of a "program or activity" in Section 504 was expanded to include "all of the operations" of a college or university.[22] Thus, as long as an institution receives any federal dollars, the entire institution is required to operate in conformity with the Rehabilitation Act.

Even with the expansion of the scope of the Rehabilitation Act effected by the Civil Rights Restoration Act, there may be some small number of institutions of higher education that receive no federal money whatsoever in support of any of their activities and that, therefore, are not subject to the requirements of Section 504. These institutions must be aware, however, that the ADA does affect them, since it prohibits discrimination, based on disability, that would deny anyone full and equal access to both public and private facilities and services. The ADA covers the activities of "public accommodations," which by definition include "a nursery, elementary, secondary, undergraduate or postgraduate private school, or other place of education."[23] Thus, as of January 1992,[24] even those institutions of higher education that are funded exclusively from private funds will be subject to nondiscrimination requirements.

Specific Student Issues

As mentioned earlier, the Department of Health, Education and Welfare (now the Department of Education) adopted extensive regulations under the authority of the Rehabilitation Act; these regulations, together with

21. This argument was based on the opinion of the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555 (1985).

22. This provision of the Civil Rights Restoration Act was passed in direct response to what Congress deemed to be the Court's incorrect interpretation of the Rehabilitation Act in *Grove City*.

23. 42 U.S.C. § 12181(7)(J).

24. This is eighteen months after enactment of the ADA. 42 U.S.C. § 12181.

the Department's analysis of them and the court cases interpreting them, provide the source for most of the information contained in this section.[25] The ADA also provides for the promulgation of implementing regulations and contemplates that they will, in general, be consistent with those under Section 504.[26] The DOJ Regulations, mentioned earlier, state that except as otherwise provided, the ADA's implementing regulations should not apply a lesser standard than do those under Section 504.[27] In addition to the Department of Justice, several agencies, including the Department of Transportation and the Architectural and Transportation Barriers Compliance Board, are now in the process of proposing, revising and adopting their implementing regulations under the ADA. These regulations should be watched as they are finalized, to see if any result in greater affirmative burdens for avoidance of discriminatory action by institutions of higher education.

Admissions

The first encounter between an institution of higher education and a disabled individual will probably occur during the admissions process. The overriding consideration in this process is that the institution may not block a prospective student's admission to the college or to a program in that college solely because of his or her disabilities, as long as that individual is otherwise qualified for admission.

To this end, the university should scrutinize carefully the tests and criteria on which it bases its admission decisions to assure that such standards do not impact unfairly against persons with disabling conditions. For example, unless public speaking is an absolute necessity for success in a given program, an oral entrance examination would have a grossly unfair effect upon a person with a severe speech disorder. Furthermore, evaluation of a particular skill that may be impaired by a disabling condition, as part of an admis-

25. The part of the regulation relating to Postsecondary Education appears as an Appendix at the end of this pamphlet.

26. 42 U.S.C. §§ 12134, 12186(c).

27. 28 C.F.R. § 36.103(a) (proposed).

sion screening, is permitted only if that skill is integral to success in that program, so that inferior performance in it would indicate that the individual may not be otherwise qualified for the program.

The university may also be required to demonstrate that the tests used for admission have been validated as predictors of success in the program, and that the government has not identified any alternate tests that may, in fact, be less discriminatory. In most cases, alternate forms of tests, designed for persons with impaired sensory or motor skills, must be made available for use by prospective students as frequently as the standard test. Furthermore, the university should ensure that its admission tests, taken as a whole, are administered in physical facilities that are accessible to disabled persons.

As a general rule, the university may not ask prospective students to identify whether they are disabled persons. The only exception is that colleges that have instituted measures to overcome past discriminatory treatment of disabled persons may offer prospective students the option of so identifying themselves. It should be noted, however, that once a student has been admitted, the university may ask whether that student has a disabling condition that may require some special accommodation. Regardless, no quota system is permissible to cap the number of students with disabilities who shall be admitted.

Adjustments to the Academic Program

Once the university has accepted a student with a disabling condition, the institution may have to develop certain alternate procedures or requirements to assure that the student can make use of the opportunity. This does not mean, however, that the university is expected to change the fundamental nature or essential curricular components of its programs in order to accommodate the needs of disabled students. Especially where an academic program is designed to prepare students for a profession in which licensure or accreditation requirements must be met, the extent of devia-

tion from the established program that may be tolerated could be minimal.

Fundamental program requirements. In an important case interpreting Section 504's application to institutions of higher education, *Southeastern Community College v. Davis*,[28] the Supreme Court stated that a nursing student who had a serious hearing impairment could not require her nursing school to adapt the nursing education program in such a way that the need to hear would be eliminated. The Court upheld the school's decision that such a change would fundamentally detract from the nursing education experience. The curriculum, as offered, required students to engage in clinical programs, and the substitution of exclusively academic course work would not result in the disabled student's receiving "even a rough equivalent of the training a nursing program normally gives."[29]

In a similar case, *Doherty, v. Southern College of Optometry*,[30] the court held that the College of Optometry could not be required to eliminate its requirement that all students, including one who was neurologically impaired, demonstrate proficiency in manipulating certain optometric instruments.

Naturally, questions about what program requirements should be maintained, in response to a request for a program alteration to accommodate the needs of a disabled student, may also be analyzed in terms of determining whether the student is "otherwise qualified" for participation in that program. If the student, by virtue of his or her impairments, is incapable of performing the tasks that are necessary to the program, then that student is not qualified for the program. The simple presence of a protected disabling condition does not overcome that failure to qualify. The Court in *Davis* recognized that there may be legitimate physical qualifications that are essential, and it explained that "[a]n otherwise qualified person is one who is able to meet all of a

28. 442 U.S. 397 (1979).

29. *Id.* at 410.

30. 862 F.2d 570 (6th Cir. 1988).

program's requirements *in spite of* his handicap."[31]

Subsidiary program requirements. On the other hand, where specific physical, motor or sensory tasks relate to a program in only a peripheral manner, the university is clearly required to make adaptations to accommodate the needs of disabled students. For instance, tests that are generally presented in written format may be administered in oral or braille format for a visually-impaired student, or an art appreciation class might be substituted for a music appreciation class in a general liberal arts curriculum designed for a hearing-impaired student. In a recent case, *Wynne v. Tufts University School of Medicine*,[32] the court found that a medical school may need to provide a dyslexic medical student with exams in essay or practicum format rather than in multiple-choice format, unless the university could demonstrate that alternative testing methods had been fully considered and then rejected for rationally justifiable reasons. In situations such as these, such adaptation is preferable to complete waiver of course and proficiency requirements.

Auxiliary Aids

Disabled students may not be denied the assistance of special aids in the classroom, such as tape recorders, note takers or adaptive equipment, when such aids are needed to enable the student to take full advantage of the program. Such aids must also be available to students in other areas of the academic program, including the library. In compliance with this part of the regulations, the college may need to make aids, such as readers, available in the library on a schedule that will permit visually-impaired students to make full use of the college's resources. As an alternative, the college could arrange to provide taped texts or braille readers that could be used by such students at their convenience. This is not to say, however, that institutions need to provide disabled students with "attendants,

31. 442 U.S. at 406 (emphasis added).

32. 59 U.S.L.W. 2644 (U.S. April 17, 1991) (No. 89-1670).

individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."[33]

The costs involved in providing this auxiliary assistance may be significant in relation to the tuition paid by the student requiring the aids. Frequently, state vocational rehabilitation agencies or other public or private programs will cover such costs for qualifying students; however, in those situations where disabled students do not qualify for such programs or other sources of financial aid, at least one court case has held that Section 504 demands that the institution not only facilitate the provision of these aids, but affirmatively provide these aids at no charge to the student.[34]

The touchstone to be used in analyzing what universities must offer students with disabling conditions is that they must provide "meaningful access" to the programs for which the students are qualified.

The ADA underscores the Section 504 obligations already imposed on universities by requiring auxiliary aids and services unless this would "fundamentally alter" the nature of the services provided to students or result in an "undue burden" on the university. The DOJ Regulations define "undue burden" and "undue hardships" to reflect the factors incorporated into those terms by the existing regulations and case law developed under Section 504.[35]

Student Housing

If the college provides housing for its students, comparable housing that is accessible to disabled individuals who require special accommodations must also be made available, at no additional cost to those students. This means that disabled students must be provided with the same range of living accommodations as is enjoyed by students who are not disabled. Furthermore, if the

33. 34 C.F.R. § 104.44(d)(2).

34. *United States v. Board of Trustees of the University of Alabama*, 908 F.2d 740 (11th Cir. 1990).

35. The section-by-section analysis appearing with the proposed regulations emphasizes that this is the intent.

university assists other organizations, such as social fraternities or living clubs, in providing housing to students, the university is also required to do what is necessary to ensure that the organization in question also makes such housing available without discriminating against those with disabling conditions.[36]

In attempting to make a university's housing policies meet the requisites of the law, the university and any other organizations that provide housing with the support of the institution do not have to remodel all of the available housing facilities so as to make them all fully accessible; instead, it is sufficient if the pool of available housing, on the whole, provides disabled students with a variety and choice of accessible units that is comparable to the variety and choice of units available to the student population in general.

The Department of Education's analysis attached to the Section 504 regulations suggests that, since universities must already have formulated procedures to assure themselves that their on- and off-campus housing meets the Title IX requisites of no discrimination based on sex, these same procedures could be utilized by the university to assure itself that the housing it provides, either directly or through other organizations, likewise complies with the dictates of Section 504.

Financial Aid

Universities that administer financial aid programs are precluded from discriminating against disabled applicants in providing assistance from university funds. The university may not limit eligibility for its financial aid, or develop criteria for aid, that would eliminate disabled recipients solely on the basis of their disabilities.

Slightly different rules apply, however, to financial aid that is administered by the university, but that comes from a source such as a trust or bequest. If the legal instrument that established the scholarship or fellowship

36. It should be noted that universities authorizing social organizations such as fraternities and sororities are also required to ensure that such organizations do not discriminate against disabled students, not only in their housing practices, but in their membership practices as well.

includes criteria that have the effect of discriminating against disabled individuals, the award may still be administered by the institution, provided that the "overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap."[37] Thus, if a few scholarships funded through endowments bequeathed to the university contain discriminatory provisions and if these awards represent only a very small percentage of the university's total financial aid program, the university should be able to continue to award those scholarships according to their terms. Certainly, it would be prudent for university development officers to make every effort to dissuade future benefactors from putting such limiting provisions into grants establishing new scholarships and to get permission from donors, wherever possible, to revise already established scholarship endowments by eliminating discriminatory language.

Athletic scholarships present their own dilemmas, since they are inextricably connected to factors involving physical prowess. Although it is illegal to deny an athletic scholarship to a disabled student solely because that student is disabled, it is permissible to deny an athletic scholarship to a student who does not possess the athletic skill required to excel at the sport for which the scholarship is given.

Thus, although a mobility-impaired student who is not outstanding at track and field may be eliminated from consideration for a track and field scholarship based on lack of skill, it does not follow that he or she may be automatically eliminated, for example, from competition for a riflery scholarship if the disabled student excels at that sport. As in the issues surrounding program admission, the focus here is on whether the disabled student is "otherwise qualified" for the scholarship.

As a general rule, in exploring the availability of financial aid for students with disabilities, the university's financial aid office should

37. 34 C.F.R. § 104.46(a)(2).

familiarize itself with the policies of its state's vocational rehabilitation services so that it can take full advantage of the awards the agency may make available to disabled students enrolled in certain types of academic and vocational programs.

Student Employment, Career Counseling and Placement

Any program under which the university hires students, such as work-study or graduate assistantships, must be administered so that no student is denied employment solely on the basis of a disabling condition. All of the usual terms of nondiscriminatory employment are applicable, as well, to the university's student/employees.[38]

In addition to ensuring compliance in its own hiring patterns, moreover, if the university assists any other entity by helping to match students with potential employers, those employment opportunities or employers must, on the whole, also embody the same nondiscriminatory protections for disabled students. This means that if the university is involved in cooperative programs, if it helps to place its students in internships or student teaching programs, or if it offers job placement assistance to its students and graduates, it must assure itself that employers with whom the students are placed do not, on the whole, discriminate on the basis of disability. While the university does not have to ensure that every position in which a student is placed adheres to proper nondiscriminatory practices, the law does require that the placement services, when viewed in their entirety, must offer to disabled students the same scope and variety of placement opportunities as is provided to nondisabled students.

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38. It should be noted that the ADA contains extensive employment provisions that take effect on July 26, 1992. These provisions are generally consistent with present Section 504 requirements and prohibit a university from discriminating in employment against an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job without posing a direct threat to the health or safety of others in the workplace. A thorough analysis of these provisions is beyond the scope of this pamphlet, except to note that, unlike Section 504, the ADA provides for enforcement by the Equal Employment Opportunity Commission, the United States Department of Justice, or individuals who are entitled to collect attorneys' fees in successful cases. 42 U.S.C. §§ 12117, 12204.

In offering career counseling to students, the college must take care not to restrict the breadth and scope of career alternatives and goals presented to disabled students. It is, however, permissible to alert disabled students to the types of obstacles that they may realistically encounter, should they choose to pursue a given career path, especially when they express interest in a profession that has licensure or certification criteria that their disabilities may preclude them from attaining.

For instance, a student who aspires to a career as a classroom teacher in elementary education may need to meet a standard for oral communication that he or she may be unable to achieve due to a severe speech impediment. There is nothing impermissible about advising the student to recognize this potential problem.

The ADA likewise speaks directly to career training in that it specifically requires any courses or certification examinations directed toward "secondary or post-secondary education, professional or trade purposes" to be given in a location and manner accessible to disabled individuals.[39] The DOJ Regulations proceed to spell out in detail the types of modifications that may be required of *private* entities offering such courses and examinations.[40]

Physical Education and Athletics

If the college operates physical education or recreational athletic programs, all students, regardless of disabilities, must be offered an equal opportunity to participate and compete in those programs. Section 504 does allow the college to develop separate programs in athletics to accommodate disabled students, but it does not permit the college arbitrarily to assign all disabled students to those programs. Students must be permitted to chose to participate in the regular sports programs, whether as part of the required curriculum or as an extracurricular activity, and they may be

39. 42 U.S.C. § 12189.

40. The section-by-section analysis explains that these details are directed at entities that are not already covered by Section 504.

enrolled in specially-adapted programs only if they so elect.

The ADA echoes this by stating that providers of public accommodations, such as colleges and universities, may not deny disabled persons the opportunity to participate in activities in an integrated setting just because specially modified programs are also made available.[41]

Moreover, disabled students must be provided the opportunity to compete for team positions that are filled on the basis of skill, in the same way that nondisabled students compete for them. The goal of the athletic program, as it relates to disabled students, must be to offer them the chance to participate in the most integrated setting appropriate to each student.

Health Care and Health Insurance

If a college's student health center focuses primarily on the treatment of minor accidents and illness, there is no mandate, under the law, that would require it to begin providing more specialized health care services for the treatment of disabling conditions. On the other hand, to the extent that the health care center does provide medical treatment to the general student population, it must provide the same range of medical services to disabled students.

In some settings, the university offers health insurance to its students, and here, as in all other areas, the insurance must not discriminate against disabled students. The latter must be offered the same type and extent of coverage that is provided to the rest of the student population. Insurance cannot be denied entirely because of a specific disability. Insurance policies often raise the issue of preexisting conditions that are not covered. If the university's policy contains such a provision, it must be applied in a nondiscriminatory manner, so that specific disabling conditions cannot be singled out as excluded from coverage, while medical costs incurred because of other preexisting conditions are paid by the policy.

41. 42 U.S.C. § 12182(b)(1)(C).

While the ADA permits a university to sponsor a benefits plan based on underwriting risks, classification of risks or administration of such risks, such a plan cannot be a "subterfuge to evade the purposes" of the law.[42]

Physical Accessibility

The overriding principle to keep in mind when considering physical accessibility of a university's facilities is that the campus, *viewed in its entirety*, must be accessible to disabled individuals. Not every part of every structure needs to be fully accessible, but, where it is impractical to make modifications that would open up a specific area, a suitable accessible alternative must be provided.

The goal should be to enable disabled students to participate in the activities of the institution in the most integrated setting possible. For example, if a course is offered in a classroom on the third floor of a building that has no elevator, the entire class should be rescheduled to meet in an accessible room rather than scheduling a separate tutorial for a student in the class who uses a wheelchair. In the same vein, disabled students living in accessible university-run housing facilities may not be segregated from the mainstream of residential students and housed in a separate dormitory.[43]

Any university facilities that are constructed with the aid of federal loans or grants must comply with the Uniform Federal Accessibility Standards developed by several agencies of the federal government.[44] These standards govern a wide range of building elements, including such items as size of entrances, provision of ramps, signage on elevators, reserved parking spaces, location of drinking fountains, rest room layouts, corridor and aisle widths and avoidance of protruding

42. 42 U.S.C. § 12201(c).

43. At least five percent of the total accommodations in a dormitory or at least one unit, whichever is greater, must be accessible to disabled students. Uniform Federal Accessibility Standards § 4.1.4(11)(b).

44. 42 U.S.C. Chap. 51.

objects.[45] Furthermore, whenever federal funds are used to finance structural alterations, and those alterations involve elements that could be modified to enhance accessibility, the more accessible form of the alteration must be elected unless it is not possible to do so structurally.[46]

The ADA requires that these same strict accessibility standards be applied to public accommodations operated by private entities and built with private funds. Therefore, any new construction in a facility that is defined as a public accommodation under the statute (including undergraduate and postgraduate private schools), planned for initial occupancy more than 30 months after enactment of the statute, and any building alterations, will also need to conform to regulatory standards of the Architectural and Transportation Barriers Compliance Board.[47] Thus, enactment of the ADA dictates that even those private colleges and universities that do not depend on any federal assistance to construct and renovate their facilities will need to comply with physical accessibility standards.

Transportation Systems

Many colleges and universities, because of their size, find it advantageous to provide some sort of shuttle bus service for use by students, employees and the public. The accessibility requirements of these transportation services are regulated by both the Rehabilitation Act and the ADA.

In keeping with the general dictates of the Rehabilitation Act, universities must take care to offer disabled individuals reasonable access to the campus transportation system. According to one recent case, *United States v. Board of Trustees of the University of Alabama*,[48] such reasonable access must provide disabled

45. A copy of the Uniform Federal Accessibility Standards is available from the Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Room 5230, 451 Seventh Street SW, Washington, DC 20410, Telephone (202)755-5404.

46. 24 C.F.R. Part 40; 41 C.F.R. Subpart 101-19.6.

47. 42 U.S.C. § 12186(c).

48. 908 F.2d 740 (11th Cir. 1990).

students transportation services that are as effective as the services offered to the student population at large, so long as such accommodations do not cause undue financial burdens on the institution. Thus, an analysis of what must be provided will turn on specific facts, including the amount the university spends on its transportation system and the cost of providing greater services to disabled students.

The ADA goes even further in spelling out definitive requirements for such systems, whether operated by a public[49] or a private entity.[50] Under the ADA, as it applies to public entities, any new bus that is to be purchased or leased must be fully accessible. If a used vehicle is newly purchased or leased, the university will need to show that it has made a good faith effort to find a used vehicle that is accessible. In addition, any older vehicle that is renovated to extend its life must be modified to make it as accessible as possible.

For demand-responsive transportation systems run by public institutions, the same requirements apply, unless the system, as a whole, already provides disabled individuals with the same level of service as is provided to others.

Private colleges that operate transportation systems over a fixed route and established schedule must follow these same accessibility guidelines when purchasing or leasing vehicles that have a seating capacity in excess of sixteen. Smaller vehicles that are newly purchased or leased need not be accessible if the system, viewed in its entirety, provides an equivalent level of service to disabled and nondisabled users. This same "viewed in its entirety" test also applies to the larger vehicles that operate only on a demand-responsive transportation system.

Conclusion

With a renewed emphasis on the rights of disabled individuals, as signified by passage of the ADA, colleges and universities can expect

49. 42 U.S.C. § 12141 *et seq.*
50. 42 U.S.C. § 12184.

increased demands to adapt and adjust their programs and facilities in an effort to provide this group of students with the fullest possible access. Of course, since the vast majority of universities and colleges receive some sort of federal money, they have long been subject to the regulations promulgated under Section 504. The new ADA is unlikely to create many significant new requirements for these institutions, except for the specific provisions relating to transportation systems. Indeed, the major direct effect of the ADA on institutions of higher education will be to extend nondiscriminatory regulations to all postsecondary educational facilities.

Beyond this, however, passage of the ADA may signal the emergence of greater recognition of the hurdles faced by disabled individuals and a greater vigilance on their behalf. In view of this increased attention, administrators would be wise to review every facet of campus life to assure themselves that no otherwise qualified student is denied any of the benefits provided by the university solely because he or she has a disability.

Checklist of University Offices and Departments that May be Affected by the Rehabilitation Act and the Americans with Disabilities Act

- ❑ Academic Affairs
- ❑ Admissions
- ❑ Athletics and Intramurals
- ❑ Career Counseling
- ❑ Financial Aid
- ❑ Housing
- ❑ Physical Education Department
- ❑ Physical Plant
- ❑ Placement Office
- ❑ Student Affairs
- ❑ Student Employment
- ❑ Student Health Insurance
- ❑ Student Health Services
- ❑ Testing and Evaluation
- ❑ Transportation Services

Appendix

34 CFR Ch. 1 (7-1-88 Edition)

Office for Civil Rights, Education

Subpart E – Postsecondary Education

§ 104.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate or that receive or benefit from Federal financial assistance for the operation of such programs or activities.

§ 104.42 Admission and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less proportionate, adverse effect are not shown by the Assistant Secretary to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to §104.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action, obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 104.43 Treatment of students: general.

(a) No qualified handicapped student shall be excluded from participation in, be denied benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of

study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 104.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipients' education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with

hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 104.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 104.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i) on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization , or person in providing employment opportunities to any of its students shall assure

itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§ 104.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of §104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

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